



DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR part 537

RIN 3141-AA58

Management Contracts

AGENCY: National Indian Gaming Commission.

ACTION: Final rule.

SUMMARY: The National Indian Gaming Commission (NIGC or Commission) issued a proposed rule revising its management contract regulations. The Indian Gaming Regulatory Act (IGRA) provides that an Indian tribe may enter into a management contract for the operation of Class II or Class III gaming activity if such contract has been submitted to and approved by the NIGC Chairman. Collateral agreements to a management contract are also subject to the Chairman's approval. This final rule makes background investigations required of all persons who have 10 percent or more direct or indirect financial interest in a management contract, of all entities with 10 percent or more financial interest in a management contract, of any other person or entity with a direct or indirect financial interest in a management contract otherwise designated by the Commission, and authorizes the Chairman, either by request or unilaterally, to exercise discretion to reduce the scope of the information to be furnished and background investigation to be conducted for certain entities.

DATES: This rule is effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Michael Hoenig, 1849 C Street NW, Mail Stop #1621, Washington, DC 20240. Telephone: 202-632-7003.

SUPPLEMENTARY INFORMATION:

I. Background

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100-497, 25 U.S.C. 2701 *et seq.*, was signed into law on October 17, 1988. The Act establishes the NIGC and sets out a comprehensive framework for the regulation of gaming on Indian lands. On January 22, 1993, the NIGC published a final rule in the Federal Register called *Background Investigations for Person or Entities with a Financial Interest in a Management Contract* (58 FR 5831). The rule added a new part to the Commission's regulations implementing the mandates of the Indian Gaming Regulatory Act of 1988 by establishing the requirements and procedures for the approval of management contracts concerning Indian gaming operations and the conduct of related background investigations. The Commission has substantively amended them numerous times, most recently in 2012 (August 9, 2012; 77 FR 47514). On December 2, 2021, the NIGC published a notice of proposed rulemaking in the Federal Register called *Background Investigations for Persons or Entities With a Financial Interest in or Having a Management Responsibility for a Management Contract* (86 FR 68446).

II. Development of the Rule

On June 9, 2021, the Commission issued a Dear Tribal Leader Letter announcing the beginning of tribal consultations on 25 CFR 537.1(a)(3), among other regulations. On July 12, 2021, the Commission issued a second Dear Tribal Leader Letter announcing the dates of virtual consultations and seeking written comments on the proposed changes to part 537. On July 27, 2021, and July 28, 2021, the Commission held virtual consultations and accepted comments from Tribes on those changes.

Upon reviewing the comments received during the consultation period from July 12 - August 12, 2021, the Commission published a Notice of Proposed Rulemaking (NPRM) on December 2, 2021 (86 FR 68446). The NPRM invited interested parties to participate in the rulemaking process by submitting comments and any supporting data to the NIGC by January 3, 2022. The consultation and the written comments have proven invaluable to the Commission in making amendments to the Management Contract regulations.

III. Review of Public Comments

Comment: One commenter suggested that the term “Chairman” be changed to “Chair” throughout the regulation.

Response: The Commission agrees with the recommendation and has made that change.

Comment: One commenter suggested that the term “indirect financial interest” was too vague and possibly too broad and should be deleted or defined.

Response: Under IGRA, the NIGC has broad authority to ensure compliance with IGRA.

Individuals or entities can have an “indirect financial interest” in innumerable ways. Any effort to define this term to specific types of relationships would improperly and unnecessarily limit the Commission’s authority to regulate financial interests in Indian gaming.

Comment: Several commenters suggest that the NIGC include information as to how and when the Commission will notify a TGRA of a unilateral decision by the Chair to reduce the scope of required information or, alternatively, what would need to be included in a request submitted by TGRAs for the same.

Response: The Commission appreciates the comments and clarifies that background investigations and suitability determinations discussed in this part pertain to management companies wishing to enter into an agreement with a tribe, not the tribe itself. As such, a request for a reduced scope background investigation would typically be made by, and granted to, a management company, individual or entity with management responsibility for the contract, or individual or entity with a direct or indirect financial interest. If a tribe or wholly owned tribal entity is proposing to manage another Tribe’s gaming operation, they may request a reduced background investigation or the Chair may elect to perform one unilaterally. In either case, the NIGC will notify the requester of a decision. As to how to make a request, the Commission responds that it will set forth any process in a bulletin. If a potential management company has questions as to how to request a reduced scope background investigation prior to the issuance of that bulletin, the Commission invites them to contact the NIGC for further information.

Comment: Another commenter supports the change to clarify the reduced scope background investigation, but suggests the NIGC add examples of “approaches the Chair may take to reduce the scope of information to be furnished. The commenter included suggested language to include in the regulation, including accepting “substantively current background information submitted previously to the Commission or other jurisdictions and providing reciprocity for background investigation results to reduce the burden of submitting duplicative information and reduce delay in background investigations.”

Response: The Commission appreciates the commenter’s support for the changes to clarify the reduced scope background investigation, and agrees that the examples suggested are a reasonable and sensible way to reduce the scope of the investigation. Ultimately, though, the Commission declines to include the suggested language. The scope of the background investigation, though reduced, is still at the discretion of the Chair, who must ultimately make the suitability determination for all entities and individuals backgrounded. The Commission does not intend through this amendment to prescribe what information the Chair must or may require as part of a reduced scope investigation.

Comment: One commenter suggested that the NIGC consider adding a standard for when the Chair exercises his or her discretion to approve a request for a reduced background investigation, e.g. what constitutes a “national bank” and to provide additional detail regarding what supporting documents tribes would be required to submit as well as timelines associated with such requests.

Response: The Commission declines to define “National Bank” or “institutional investor” in its regulations, as these are terms commonly understood in the Banking and Finance industries. A National Bank is widely understood to mean a Commercial Bank formed under the National Bank Act, 12 U.S.C. 38, chartered by the Comptroller of the Currency, and a member of the Federal Deposit Insurance Company. The term “institutional investor” is defined by and must be registered with, the Securities and Exchange Commission.

Comment: One commenter objected to the NIGC changing its regulation to initially require background checks and suitability determination on entities and individuals that have 10 percent or more direct or indirect financial interest in a management contract. The Commenter believes that imposing a 10 percent interest threshold is “an arbitrary approach that will encourage ‘bad actors’ to structure their deals below the 10 percent threshold to avoid NIGC scrutiny. The Commenter further asserts that the change will improve efficiency at “the expense of tribes who rely on the NIGC to keep ‘bad actors’ out of Indian gaming and that the amendment “conflicts with the requirements of the IGRA.”

Response: The Commission thanks the Commenter for its input on this topic. It has determined to finalize the Change, however, and responds that the change will not negatively impact the agency’s ability to protect the interests of Tribes. At the outset, it is important to note that the NIGC is not changing the requirement to submit any individual or entity that has management responsibility for the contract. Accordingly, the NIGC will still require background investigations and suitability determinations for all individuals and entities that may have any decision-making authority or influence over the contract or the Tribe’s gaming operation.

Rather, the purpose of the change is to reduce the time and expense of background investigations by no longer requiring the initial submission of those with minor financial interests in, but no control over, the management contract or the gaming operation. Moreover, the regulation includes a provision requiring a background investigation and suitability determination for “any other person or entity with a direct or indirect financial interest in a management contract otherwise designated by the Commission.” When a management contract is submitted, the NIGC’s background investigators ensure that the list that was submitted is accurate. As part of that review, they will ask for a full list of all the entities and individuals involved in, and with a financial interest in, the contract, even if not all of those entities and individuals will be subject to a background investigation. If, however, investigators identify an entity or individual that should be subject to further review, the Commission may order such

pursuant to § 537.1(a)(3). For these reasons, the Commission does not believe the amendment creates any additional risk to Tribes, does not permit a bad actor to structure its management contract in a way that allows them to escape review from the NIGC, and meets IGRA's purpose of "shielding tribes from organized crime and other corrupting influences."

Regulatory Matters

Regulatory Flexibility Act

The proposed rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Moreover, Indian Tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an effect on the economy of \$100 million or more. The rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies, or geographic regions, nor will the proposed rule have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of the enterprises, to compete with foreign based enterprises.

Unfunded Mandate Reform Act

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that the proposed rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

National Environmental Policy Act

The Commission has determined that the rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

Paperwork Reduction Act

The information collection requirements contained in this rule were previously approved by the Office of Management and Budget (OMB) as required by 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 3141– 0007.

Tribal Consultation

The National Indian Gaming Commission is committed to fulfilling its tribal consultation obligations—whether directed by statute or administrative action such as Executive Order (EO) 13175 (Consultation and Coordination with Indian Tribal Governments)—by adhering to the consultation framework described in its Consultation Policy published July 15, 2013. The NIGC’s consultation policy specifies that it will consult with tribes on Commission Action with Tribal Implications, which is defined as: Any Commission regulation, rulemaking, policy, guidance, legislative proposal, or operational activity that may have a substantial direct effect on an Indian tribe on matters including, but not limited to, the ability of an Indian tribe to regulate its Indian gaming; an Indian Tribe’s formal relationship with the Commission; or the consideration of the Commission’s trust responsibilities to Indian tribes.

Pursuant to this policy, on June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation announcing that the Agency intended to consult on a number of topics, including proposed changes to the management contract process. On July 27, 2021, and July 28, 2021, the Commission held two virtual consultations on the proposed changes to the

management contract process.

List of Subjects in 25 CFR Part 537

Gambling, Indian--lands, Indian--tribal government, Reporting and recordkeeping requirements

For the reasons set forth in the preamble, the Commission amends 25 CFR part 537 as follows:

PART 537 – BACKGROUND INVESTIGATIONS FOR PERSONS OR ENTITIES WITH A FINANCIAL INTEREST IN, OR HAVING MANAGEMENT RESPONSIBILITY FOR, A MANAGEMENT CONTRACT

1. The authority citation for part 537 continues to read:

Authority: 25 U.S.C. 81, 2706(b)(10), 2710(d)(9), 2711.

2. Amend § 537.1 by revising paragraphs (a)(1) through (3) and adding paragraph (d) to read as follows:

§ 537.1 Applications for approval.

(a) * * *

(1) All persons who have 10 percent or more or indirect financial interest in a management contract;

(2) All entities with 10 percent or more financial interest in a management contract; and

(3) Any other person or entity with a direct or indirect financial interest in a management contract otherwise designated by the Commission.

* * * * *

(d) For any of the following entities, or individuals associated with the following entities, the Chair may, upon request or unilaterally, exercise discretion to reduce the scope of the information to be furnished and background investigation to be conducted:

(1) Tribe as defined at 25 CFR 502.13;

(2) Wholly owned Tribal entity;

(3) National bank; or

(4) Institutional investor that is federally regulated or is required to undergo a background investigation and licensure by a State or Tribe pursuant to a Tribal-State compact.

Edward Simermeyer

Chairman

Jean Hovland

Vice Chair